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In the
Supreme Court of the United States
October Term, 1993

ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH CLAIR,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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30 pp

QUESTIONS PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251, or 28 U.S.C. § 1651(a), based solely on a request for appointment of counsel which expressed no more than an intention to file a petition for writ of habeas corpus?

Does Local Civil Rule 26.8.7, which authorizes a temporary stay of execution pending appointment of counsel, violate the Separation of Powers Doctrine?

May a district court disregard the fact that an application for extension of a stay of execution was made by one with no legal authority to do so?

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v.

KENNETH CLAIR,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Petitioners, Arthur Calderon, Warden, California State Prison at San Quentin, California, and Daniel E. Lungren, Attorney General of the State of California, hereby respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit filed on December 30, 1993. That order determined that petitioners' appeals from orders staying execution of a state death judgment were moot.

OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Ninth Circuit, which dismissed the appeals as moot, is unpublished. (App., *infra*, 2a.)

The opinion of the United States District Court for the Central District of California, which denied petitioner's motion to vacate the stay, is reported at *Clair v. Vasquez*, 827 F.Supp. 1465 (C.D. Cal. 1993). (App., *infra*, 9a-14a.)

The orders of the United States District Court for the Central District of California, which stay execution of the State death judgment, are unpublished. (App., *infra*, 3a-8a, 15a-23a.)

The opinion of the United States Court of Appeals for the Ninth Circuit, which controls this case, is reported at *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. den.* ___ U.S. ___, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992). (App., *infra*, 29a-42a.)

JURISDICTION

The court of appeals entered its order dismissing the appeals as moot on December 30, 1993. (App., *infra*, 2a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND LOCAL COURT RULES INVOLVED

Title 28, United States Code, section 2251, states as follows:

> "A justice or judge of the United States before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding."

Local Civil Rule 26.8.7 of the United States District Court for the Central District of California states as follows:

> "(a) Stay Pending Final Disposition: Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the district court shall issue a stay of execution pending the final disposition of the matter.
>
> "(b) Temporary Stay for Appointment of Counsel: Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection panel will designate any attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay shall remain in effect for forty-five (45) days unless extended by the court."[1/]

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[1] It should be noted that the other district courts in California have adopted a virtually identical local rule. *Compare* U.S. Dist. Ct. (E.D. Cal.), L.R. 191(h)(1); U.S. Dist. Ct. (S.D. Cal.), L.R. 9.3(b)(8); *and* U.S. Dist. Ct. (N.D. Cal.), L.R. 296-8(b).

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Clair was convicted of murdering Linda Faye Rogers, a live-in baby sitter, while he burglarized a Santa Ana, California, residence and, consequently, was sentenced to death. On direct appeal, the conviction was affirmed by the Supreme Court of California. *People v. Clair*, 2 Cal.4th 629, 7 Cal.Rptr.2d 564, 828 P.2d 705 (1992).[2] A petition for writ of certiorari, challenging the affirmance of the judgment on direct appeal, was denied by this Court on January 11, 1993. *Clair v. California*, ___ U.S.___, 113 S.Ct. 1006, 122 L.Ed.2d 155 (1993). On February 19, 1993, the Superior Court of the State of California in and for the County of Orange ordered Clair be executed on April 13, 1993.

B. Proceedings in the District Court

On or about February 22, 1993, Clair, *in pro per*, caused to be filed in the United States District Court for the Central District of California a request for appointment of counsel and stay of execution. (App., *infra*, 24a-27a.) Clair stated in his request that he intended to file a petition for writ of habeas corpus and to allege federal constitutional errors in his petition, but his request for appointment of counsel and for a stay of execution contained no such allegations. (App., *infra*, 24a-27a.) On March 2, 1993, citing Local Rule 26.8.7(b), the district

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[2] In an unpublished order, the Supreme Court of California also denied a petition for writ of habeas corpus. *In re Clair On Habeas Corpus*, No. S024707, order filed on February 28, 1992.) Subsequently, a petition for rehearing of appellant's direct appeal was denied. *People v. Clair*, No. S004789, order filed on June 24, 1992.

court ordered a stay of execution for forty-five (45) days to and including May 28, 1993. (App., *infra*, 22a-23a.) A timely notice of appeal was filed.

On or about May 25, 1993, Attorney Michael G. Millman caused to be filed in the U.S. District Court for the Central District of California an Application for Stay of Execution, as well as other related applications.(App., *infra*, 19a-21a.)[3] On May 27, 1993, citing Local Rule 26.8.7(b), the district court extended the stay of execution for an additional forty-five (45) days to and including August 11, 1993. (App., *infra*, 17a-18a.)

On July 23, 1993, in a published order the district court denied petitioner's motion to vacate the stay of execution. *Clair v. Vasquez*, 827 F.Supp. 1465 (C.D. Cal. 1993). (App., *infra*, 9a-14a.)[4] A timely notice of appeal was filed.

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[3] Millman is a California attorney employed by California Appellate Project, a San Francisco based organization which provides appellate counsel in California capital cases. Millman also is a member of the bar of the U.S. District Court for the Central District of California. Millman stated in his application that he was acting as a member of the Selection Board for the United States District Court for the Central District of California and was "acting on behalf of" Clair. (App., *infra*, 19a-21a.)

[4] On July 12, 1993, a further 30-day extension of the stay was granted. (App., *infra*, 15a-16a) On July 22, 1993, respondent's request for appointment of counsel was granted and counsel was appointed by the district court to represent respondent concerning his federal habeas corpus challenge of his state conviction. On July 28, 1993, a further 60-day extension of the stay was granted. (App., *infra*, 7a-8a.) On October 7, 1993, a further 120-day extension of the stay of execution was granted. (App., *infra*, 5a-6a.) On November 12, 1993, the district court ordered respondent to file his petition on or before September 15, 1994, and extended the stay of execution to September 19, 1994. (App., *infra*, 3a-4a.)

C. Proceedings in the Court of Appeals

On December 30, 1993, in an unpublished order the United States Court of Appeals for the Ninth Circuit dismissed the appeals as moot. *Clair v. Vasquez*, Nos. 93-99004 & 93-99010, order filed on December 30, 1993. (App., *infra*, 2a.)

REASONS FOR GRANTING THE PETITION

The prior decision of the court of appeals in *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. den.* ___ U.S. ___, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992), which governs this matter, is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit. *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993), *cert. granted* 114 S.Ct. 544, 126 L.Ed.2d 446 (1993). Although this case presents the question presented in *McFarland*, it also presents the further question whether the local civil rule of court involved in this case violates the Separation of Powers Doctrine.

Moreover, in refusing to review the district court's determination that, although Attorney Millman had no legal authority to act on respondent's behalf when he requested an extension of the stay of execution, nevertheless it was within the district court's discretion to disregard this defect, the court of appeal has sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I. PRE-PETITION STAYS OF EXECUTION BY FEDERAL COURTS ARE NOT AUTHORIZED BY THE FEDERAL HABEAS CORPUS STATUTE.

Federal habeas corpus review of state court judgments is a statutory remedy, not a constitutional one. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT AND PROPOSAL OF THE AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, at 3-4 (Aug. 23, 1989) (hereafter *Powell Committee Report*); *see also* D. Lungren & M. Krotowski, *Public Lessons from the Robert Alton Harris Case*, 40 UCLA L. Rev. 295, 300 (1992) (distinguishing three forms of habeas corpus). As this Court has aptly stated, "federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings *only in specified circumstances*. Before granting a stay, therefore, federal courts must make certain that *an adequate basis exists for the exercise of federal power.*" (Emphasis added.) *Demosthenes v. Baal*, 495 U.S. 731, 737, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990).

Disposition of the first question presented will therefore turn on whether Congress has expressly authorized federal courts to grant pre-petition stays of execution. The Ninth Circuit previously found no statutory authority but nevertheless held that the underlying purpose of the writ of habeas corpus, as reflected in Local Civil Rule 26.8.7, was sufficient to confer jurisdiction. *Brown*, 952 F.2d at 1165. More recently the Fifth Circuit held no such authority exists. *McFarland*, 7 F.3d at 49.

The federal habeas corpus statute contains only one provision concerning the authority of federal courts to stay

state court judgements. 28 U.S.C. §2251. While section 2251 does constitute an exception to the Anti-Injunction Act,[5] it does not authorize any pre-petition stay of execution. By its very terms, a stay of a state court judgment may issue only when "a habeas corpus proceeding is pending" before the district court. 28 U.S.C. § 2251.

When then may it be said that a habeas corpus proceeding is pending? The federal habeas statute defines the obligations and requirements which must be met before the federal habeas judicial process is successfully invoked. Inception of a federal habeas proceeding occurs upon the filing of an "application . . . in the form of a petition for a writ of habeas corpus." 28 U.S.C. § 2254, Rule 2(a); *see also* Advisory Committee Note to Habeas Corpus Rule 2 (1976) (specifying requirements of the actual petition). Thus, the plain meaning of the statute resolves the issue.

II. LOCAL CIVIL RULE 26.8.7, WHICH AUTHORIZES A TEMPORARY STAY OF EXECUTION PENDING APPOINTMENT OF COUNSEL, VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Contrary to the plain meaning of the statute, the Ninth Circuit has held that section 2251, in conjunction with a local civil rule of court, furnishes the district court with jurisdiction to stay an execution before a federal habeas petition is filed so that a state prisoner may request appointment of counsel. *Brown*, 952 F.2d at 1165. A close examination of this automatic stay rule -- a *sine qua non* to

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[5] 28 U.S.C. § 2283.

the *Brown* rationale and holding -- shows it was adopted in violation of the Separation of Powers Doctrine.

The Separation of Powers Doctrine operates to ensure that "each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

Only Congress -- not a district court -- can enact the policy embodied by the local rule applied in *Brown* and in this case. For at least three reasons this local rule constituted "an exercise of legislative power" since it "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . all outside the Legislative Branch." *Id.* at 952.

First, the local rule alters the obligations and relations of petitioners and the State in federal habeas corpus proceedings. Under the local rule, enforcement of a final and presumptively valid state court judgment has been denied for nearly a year. [6]

Second, the local rule essentially circumscribes the long-standing congressional prohibition against federal court stays under the Anti-Injunction Act. Only Congress may accomplish this result as it has in the past. *See e.g., Mitchum v. Foster*, 407 U.S. 225, 234-235, 92 S.Ct. 2151,

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[6] It should be noted that, in *Brown*, the local rule permitted a stay of 165-days before any petition was filed. In this case, assuming no further extensions of the stay order are granted, more than 500-days will have elapsed before a petition is filed.

32 L.Ed.2d 705 (1972) (listing federal statutes qualifying under the "expressly authorized" exception to the Anti-Injunction Act).

Third, the fact that the local rule constitutes a legislative act is further demonstrated by recent attempts at federal habeas corpus reform. In the current Congress, legislation was introduced in the Senate which would have permitted a stay of execution in capital cases "upon application to any court that would have jurisdiction over a habeas corpus petition." S.1441, § 3(b), 103d Cong., 1st Sess., 139 Cong. Rec. S10,927 (Aug. 6, 1993); *see also Powell Committee Report*, at 13-16 (habeas corpus reform proposal, § 2257(a), providing for the mandatory stay of execution following the appointment of counsel after certain conditions have been met).

Clearly, "[w]ithout the challenged [local rule], this [automatic stay] could have been achieved, if at all, only by legislation." *Chadha*, 462 U.S. at 953-954. A federal court simply may not establish jurisdiction to issue pre-petition stays by a local rule when such jurisdiction does not exist pursuant to federal statute. *See Washington-Southern Co. v. Baltimore, Philadelphia S.B. Co.*, 263 U.S. 629, 635, 44 S.Ct. 220, 68 L.Ed. 480 (1924) ("no rule of court can enlarge or restrict jurisdiction"). Since 1793, Congress has specified that local rules of court "shall be consistent with Acts of Congress." 28 U.S.C. §2071(a); 12 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE, § 3151, at 216 (1973 ed.). Since 1934, Congress has prohibited automatic stays in federal habeas cases. Act of June 19, 1934, ch. 673, 48 Stat. 1177; H.R. Rep. No. 1726, 73d Cong. 2d Sess. 1 (1934)(describing

purpose of legislation). Thus, it is clear the local rule relied upon in *Brown* and in this case violates the Separation of Powers Doctrine and must be rejected.

III. WHERE STANDING ESSENTIALLY DEFINES WHETHER THERE IS A JUSTICIABLE CASE OR CONTROVERSY, THE DISTRICT COURT MAY NOT DISREGARD THE FACT THAT AN APPLICATION FOR EXTENSION OF A STAY OF EXECUTION WAS MADE BY ONE WITH NO LEGAL AUTHORITY TO DO SO.

In this case, there also was no basis for federal jurisdiction to extend the stay of execution since the request came from Attorney Millman, rather than from Clair, or someone properly authorized to represent him. Inasmuch as the defect was jurisdictional, it was not within the district court's discretion to disregard it.

Although initially, Clair, *pro se*, had requested appointment of counsel and a stay of execution, subsequently, Attorney Millman caused to be filed an application for extension of the stay.[7] In his application, Attorney Millman said he was "acting on behalf of" Clair and as a member of the district court's Selection Board. (App., *infra*, 19a-21a.) Subsequently, the application was granted and petitioner's motion to vacate the stay was denied. *Clair v. Vasquez*, 827 F.Supp. 1465 (C.D. Cal. 1993).

In its opinion, the district court concluded that, although Millman had "no legal authority to act on [Clair's] behalf," it was "within the Court's discretion to disregard

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[7] Supra, n. 2.

this defect. (*See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990)." *Clair*, 827 F.Supp. at 1466-1467.

The "standing" of an applicant is essential in determining whether there is a justiciable case or controversy. *Whitmore v. Arkansas*, 495 U.S. 149, 154-155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). Assuming, as the district court found, that the applicant had no standing, may such a defect be disregarded?

To support it's conclusion that it may disregard such a defect, the district court relied upon *Hendricks*, 908 F.2d at 491. In *Hendricks*, the district court summarily dismissed a petition for writ of habeas corpus. *Id.*, at 491. Preliminarily, it was urged the district court was without jurisdiction to consider Hendrick's petition because it was not verified by Hendricks as required by law. *Id.* Recognizing that consideration of an unverified petition was permissible, the Ninth Circuit Court of Appeals concluded that lack of verification alone would not support summary dismissal where examination of the petition revealed that it did not otherwise meet the standards for summary dismissal. *Id.*

As is readily evident, the district court's reliance on *Hendricks* is misplaced. There is no reasonable comparison between failure to verify a petition and the presentation of an application by one who has no legal authority to do so. The requirement of a "case or controversy" is not merely a statutory requirement or traditional rule of practice but rather is imposed directly by the Constitution. *Whitmore*, 495 U.S. at 161; *see also Lujan v. Defenders of Wildlife*, 504 U.S. ____, 119 L.Ed.2d 351, 363-364, 112 S.Ct. 2130 (1992) (the doctrine

of standing is one of the landmarks setting apart cases and controversies that are of the justiciable sort referred to in Article III); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993) (standing presents a threshold jurisdictional question). Thus, it was not *permissible* for Millman to apply for a stay in Clair's behalf and that fact may not simply be ignored.

Although in this case, subsequently counsel was appointed to represent Clair and the current stay of execution was sought and obtained by counsel, it needs to be made clear that a stay of execution in a capital case may be obtained only by the defendant *pro se*, or by properly appointed or retained counsel, or by a properly qualified "next friend." The district court's statement that "it would be unfair to [respondent] to set aside the stay on [the] basis" that Millman had no standing is untrue. It focused solely on fairness to Clair alone and ignored the State's right to due process. Death penalty law may be different, but not so different as to deny fundamental fairness to the society which the law is supposed to protect. Presentation of a request for a stay of execution in a capital case by one with no authority to make such a request is a jurisdictional defect which may not be disregarded.

IV. REVIEW IS NECESSARY BECAUSE OF THE SIGNIFICANCE OF THE ISSUES PRESENTED IN THE ADMINISTRATION OF THE FEDERAL HABEAS STATUTES, AS WELL AS THE SERIOUS HINDRANCE TO EFFECTIVE ADMINISTRATION OF THE LAW CAUSED BY *BROWN* AND ITS PROGENY.

There are multiple opportunities for, and potential sources of delay, in the federal habeas process. *See, e.g., Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514, 2520 n.7, 120 L.Ed.2d 269, 281 n.7 (1992) ("condemn[ing] . . . any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack the time to give them the necessary consideration before the scheduled execution"); *In re Blodgett*, 503 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (discussing federal court delay). This case presents questions concerning pre-petition delay; that is, delay which occurs *before* a federal habeas petition has been filed.

When considering the issue of delay in federal habeas proceedings, one must remain mindful of the "secondary and limited" function of collateral review. *Barefoot v. Estelle*, 463 U.S. 880, 887, 13 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *see also Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 1719-1720, 123 L.Ed.2d 353 (1993). The collateral challenge -- while an important federal right -- is not without its costs. The enforcement of the state judgment is suspended pending final resolution of the collateral attack. *Blodgett*, 116 L.Ed.2d at 674; *see also McCleskey v. Zant*, 499 U.S. 467, 491, 111 S.Ct.

1454, 113 L.Ed.2d 517 (1991). Victims of the crime -- and their family members and friends -- cannot attain closure until there is finality. Delay also aggravates the deterrence objectives of the criminal law. *See*, L. Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035 (1989) (noting that the "years of delay between sentencing and execution . . . undermine the deterrent effect of capital punishment").

While any delay in the collateral review process levies costs on the criminal justice system, pre-petition delay exacts its own unique costs. Delay at this incipient stage is particularly acute since there has been no showing that any substantial constitutional rights may be in issue. Without such a showing, the petitioner is in a "no-lose" situation in obtaining this delay, which typically permits subsequently appointed counsel to engage in a "fishing expedition" in the hope that one issue might be found.

This case is particularly illustrative of the problem. In this case nearly a year has elapsed since the district court issued its stay order and no federal habeas petition has been filed. Moreover, based on the district court's most recent order, no petition is due until September 15, 1994. (App., *infra*, 3a-4a.) At that point in time, more than 18 months will have elapsed during which time Clair has been permitted virtually unlimited access to the federal treasury for the purpose of a "fishing expedition" in the hope that he might find one single federal constitutional issue which *might* be used to challenge a presumptively correct state court judgment.

Moreover, since 1988, in California there have been 70 cases in which there was no federal habeas petition filed

but the federal district court nevertheless ordered a stay of execution. (App., *infra*, 52a-59a.) Thirty-five (35) of these cases remain outstanding, *i.e.*, no federal habeas petition has been filed. (App., *infra*, 52a-59a.)[8] The average delay involved in the 35 cases in which a habeas petition was filed following a pre-petition stay has been 429 days. (App., *infra*, 52a-59a.)

In *Blodgett*, this Court referred to the "severe prejudice" sustained by the State of Washington by a prolonged stay of execution and failure of the federal courts to resolve the case. *Blodget*, 116 L.Ed.2d at 674. As is clearly apparent from this case, as well as the other California capital cases involving pre-petition delay, unacceptable delay is the rule rather than the exception.

V. THE QUESTIONS PRESENTED ARE NOT MOOT INASMUCH AS THIS CASE PRESENTLY INVOLVES A PRE-PETITION STAY AND INVOLVES AN ISSUE CAPABLE OF REPETITION.

A case is moot if it has lost its character as a present live controversy. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). When the question sought to be adjudicated has been mooted by

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[8] The oldest case is that involving James Willis Johnson. (App. *infra*, 55a.) In 1980, Johnson murdered his victim in the course of a robbery. He was sentenced to suffer the death penalty in 1982. The judgment was affirmed by the California Supreme Court in 1989 and a writ of ceriorari was denied by this Court on March 19, 1990.

Johnson's request for appointment of counsel was filed on November 9, 1990, in the U.S. District Court for the Northern District of California and, on January 7, 1991, the district court stayed Johnson's execution. *Johnson v. Vasquez*, No. CV90-3219-DLJ (stay order filed January 7, 1991). More than three years have elapsed without the filing of a petition for writ of habeas corpus.

developments subsequent to the filing of the complaint, no justiciable controversy is presented. *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). However, all subsequent events do not necesarily moot the issues presented. *Mancusi v. Stubbs*, 408 U.S. 204, 205-207, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

Moreover, questions capable of repetition are not moot. *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *see also Anderson v. Celebrezze*, 460 U.S. 780, 784, n.3, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). Application of this exception to the mootness doctrine is appropriate in cases that would justify decision on the ground that the prospect of repetition is so close that the expired action continues to have a present impact. *See Meyer v. Grant*, 486 U.S. 414, 417 n.2, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988).

At the time the court below dismissed the appeals (as well as currently), this case involved a pre-petition stay. Although counsel has been appointed, no petition has yet been filed and it is expected no petition will be filed until September 1994, or later. Moreover, in 17 other California capital cases now pending before the U.S. District Court for the Central District of California a pre-petition stay of execution has been granted. (App., *infra*, 56a-60a.) In these cases, although execution has been stayed, no petition for writ of habeas corpus has been filed.

(App., *infra*, 55a-59a.)[9] Thus, in concluding the appeals were moot the court of appeal failed to recognize that, so long as the case involved a pre-petition stay and, in view of the fact that it was easily capable of repetition, the matter had not lost its character as a present live controversy.

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[9] The same situation prevails in 10 cases now pending in the U.S. District Court for the Northern District of California; in five cases now pending in the U.S. District Court for the Eastern District of California; and in one case now pending in the U.S. District Court for the Southern District of California. (App., *infra*, 54a-59a.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 15, 1994

Respectfully submitted,

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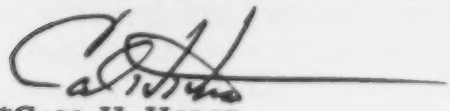

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No.

October Term, 1993

Arthur Calderon, Warden, and
Daniel E. Lungren, Attorney
General of California,
Petitioners

v.

Kenneth Clair,
Respondent

I, the undersigned, hereby declare that I am a citizen of the United States, that I am 18 years of age or older, that I am employed in the County of San Diego, State of California, in which county the below stated mailing occurred, that I am not a party to the subject cause, and that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

I further declare that I have caused the within

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

to be served on:

William K. Sutter, Clerk, Supreme Court of the United States, Washington, DC 20543, an original and 40 copies;

and by placing one or more copies in a separate envelope addressed to each addressee named below which envelope was then sealed and, with postage prepaid, deposited in the United States mail by me at San Diego,California, on the 15th day of March 1994:

Cathy Catterson, Clerk
U.S. Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

U.S. District Court
Hon. G.L. Taylor
751 W. Santa Ana Blvd
Santa Ana, CA 92701-4793

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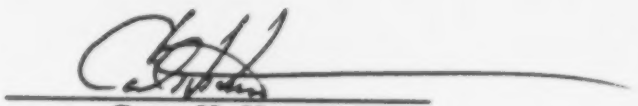
I further declare that there is delivery service by the United States Postal Service and/or private courier service at each place so addressed, or regular communication by the United States Postal Service and/or private courier service between the place of mailing and each place so addressed.

I hereby further declare, under penalty of perjury, that the foregoing is true and correct.

Dated at San Diego, California, this the 15th day of March, 1994.



CARL H. HORST,
Deputy Attorney General